IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 2 1969

ILLIAM WARD EHLERT,
Appellant,

v.

NITED STATES OF AMERICA,
Appellee.

No. 21930

BRIEF FOR THE APPELLEE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NINTH CIRCUIT

WILLIAM WARD EHLERT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 21930

BRIEF OF THE APPELLEE

JURISDICTION

This is a timely appeal, [1/] by appellant with retained counsel, from a judgment of conviction and sentence for violation of the Universal Military Training and Service Act [Title 50 Appendix U.S.C., § 462(a)]. Jurisdiction in the District Court was predicated on Title 50 Appendix U.S.C., § 462(a) and Title 18 U.S.C., § 3231; jurisdiction on appeal

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1/ A judgment of conviction and commitment was entered against the appellant, represented at all stages of the proceedings by retained counsel Arthur Wells, Jr., on May 31, 1967 (Record (hereinafter referred to as R.), Vol. 1, p.8). A notice of appeal was filed on June 5, 1967 (R., Vol. 1, p.9; Fed. R. Crim. P. 37(a)(2).)

is invoked under Title 28 U.S.C., § 1291 and § 1294.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW:

The Federal Grand Jury at San Francisco, California, returned an indictment on December 14, 1966, in one count charging appellant with a violation of Title 50 Appendix U.S.C. § 462(a), (R., Vol. 1, p.2). Specifically, the indictment charged that "WILLIAM WARD EHLERT, defendant herein, on or about February 9, 1966, * * * did willfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act, as amended, and the rules, regulations, and directions duly made pursuant thereto, in that he, having reported for induction as ordered by his local board, did then and there refuse to submit to induction into the Armed Forces of the United States."

The appellant pleaded not guilty, and, following the execution of a jury waiver, the case was tried and concluded on March 29, 1967, before the Hon. Alfonso J. Zirpoli (R., Vol. 1, pp.3,11). Appellant was found guilty, and on May 31, 1967, was sentenced to the custody of the Attorney General for a period of two years (R., Vol. 1, p.8). This appeal followed. Appellant is presently at large on bail in the

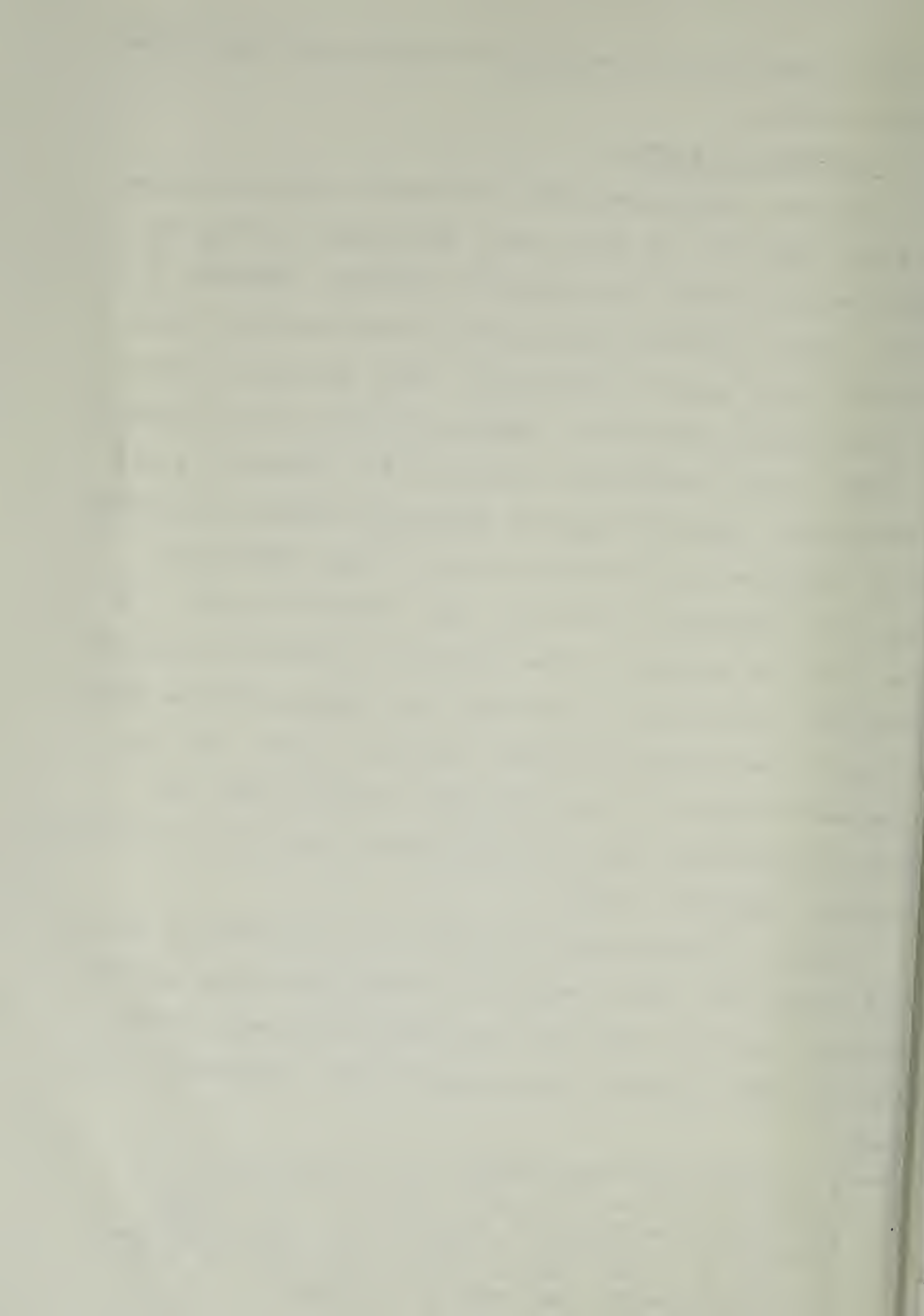
amount of $500.00, and execution of sentence has been stayed pending appeal.

B. STATEMENT OF FACTS:

Appellant registered with the Selective Service System at Local Board No. 18, Santa Rosa, California, on July 24, 1961, two days after his eighteenth birthday (Exhibit, [2/] p.2). In his original Classification Questionnaire, filed with the local board on January 20, 1964, he made no claim of conscientious objection (Exhibit, pp.4,7), and on March 3, 1964, he was accordingly classified I-A (Exhibit, p.11). Subsequently, after having been physically examined and found fully qualified for military service, he was ordered to report for induction on July 14, 1965 (Exhibit, p.17). On that date, he reported to the bus depot to which he had been directed, but refused to board the bus, stating that he would not go to the Induction Station (Exhibit, p.22). He was directed to report to the local board which he did, and there requested SSS Form No. 150, Special Form for Conscientious Objector (Exhibit, p.22).

Without signing either statement A or statement B on the face of SSS Form 150 as required in the instructions printed thereon, appellant submitted the form to his local board on July 26, 1965, together with a brief letter (Exhibit, pp.24, 25-28).

2/ A certified and exemplified copy of Appellant's Selective Service file was introduced into evidence as Plaintiff's Exhibit 1 (R., Vol. 1, p.9). That Exhibit was designated as part of the record on appeal (R., Vol 5, p.14), and is before this Court as such, and is hereinafter referred to as Exhibit.



On January 18, 1966, appellant's Selective Service file having in the meantime been forwarded to the United States Attorney for prosecutive determination and having been returned to the local board for further review (Exhibit, pp.29-35), the local board considered appellant's claim and declined to re-open his classification or to re-classify him on the ground that he had not demonstrated a change in his status which was beyond his control (Exhibit, pp.11,39). Appellant was so advised (Exhibit, p.36), and was thereafter ordered to report for induction on February 9, 1966, pursuant to the original induction order (Exhibit, p.38). He reported as ordered but refused to complete the processing necessary to determine his acceptability for military service (Exhibit, p.42). These proceedings ensued.

STATUTE AND REGULATION INVOLVED

Title 50 Appendix U.S.C. § 462(a) provides in pertinent part as follows:

> * * * any person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of * * * [the Universal Military Training and Service Act] or rules, regulations, or directions made pursuant to * * * [the Universal Military Training and Service Act] shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

32 C.F.R. § 1632.14 provides in pertinent part as follows:

> Duty of Registrant to Report for and Submit

to Induction. --(a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252) * * * it shall be the duty of the registrant to report for induction at the time and placed fixed on such order. * * *

(b) Upon reporting for induction, it shall be the duty of the registrant * * * (5) to submit to induction * * *

32 C.F.R. § 1625.2 provides in pertinent part as follows:

> The local board may reopen and consider anew the classification of a registrant * * * provided, * * * the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from the circumstances over which the registrant has no control.

QUESTIONS PRESENTED

Whether a change in status to that of conscientious objector is a change within the meaning of 32 C.F.R. Section 1625.2, and whether in any event the record reflects a basis in fact for the refusal of appellant's local board to re-open his classification following his submission after his induction order had issued of a claim for conscientious objector status.

SUMMARY OF ARGUMENT

A change in status to that of conscientious objector is not, as a matter of law, a change in status beyond a registrant's control within the meaning of 32 C.F.R. Section 1625.2.

Alternatively, without reference to the question of whether a change in status to that of conscientious objector is a change within the above-cited regulation, there exists a basis in the record before this Court for upholding the local board's determination and thus appellant's conviction.

ARGUMENT

I. A CHANGE IN STATUS TO THAT OF CONSCIENTIOUS OBJECTOR IS NOT, AS A MATTER OF LAW, A CHANGE IN STATUS BEYOND A REGISTRANT'S CONTROL WITHIN THE MEANING OF 32 C.F.R. § 1625.2.

It is the Government's position that a change in status to that of conscientious objector is not, as a matter of law, a change in status beyond a registrant's control within the meaning of 32 C.F.R. § 1625.2. 3/ The court below so ruled, at least by implication, and that ruling is assigned as error.

It should be noted at the outset that the trial court's ruling in this case is susceptible of more than one interpretation. Judge Zirpoli stated, without elaboration:

> If this were a case in Judge Kaufman's Circuit I would feel, based on the record before me, I would have to, I would have to acquit the accused. (R., Vol. III, p. 31)

His reference is to Judge Kaufman's decision in <u>United States</u>

3/ If this position is upheld, it would follow, of course, that appellant was not denied due process by the failure of his local board to re-open his classification following his submission of SSS Form No. 150, regardless of the nature of his beliefs or the point in time at which they crystalized.

v. Gearey, 368 F.2d 144 (2d Cir., 1966), 4/ and his determination that, consistent with that decision, an acquittal would be required indicates at least that he believed appellant's views with respect to conscientious objection matured after his induction notice was mailed. To be completely consistent with Gearey, however, in order to suggest an acquittal he would also have had to have concluded that appellant was in fact entitled to conscientious objector status, and it is submitted that there is nothing in the record before this Court to suggest that the trial court was so persuaded. Nevertheless, the court did make the statement quoted above, and it follows that the court's ultimate determination of guilt necessarily involved the proposition urged by the Government here.

Three other Circuits have taken the position argued for by the Government. In Davis v. United States, 374 F.2d 1 (5th Cir, 1967), United States v. Al-Majied Muhammad, 364 F.2d 223 (4th Cir., 1966), and United States v. Schoebel, 201 F.2d 31 (7th Cir., 1953), 5/ with respect to factual

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4/ In Gearey, Judge Kaufman took the position that if a registrant's beliefs with respect to conscientious objection brought him within the ambit of the exemption and those beliefs ripened only after he had been mailed a notice to report for induction, a change in his status resulting from circumstances over which he had no control would have come about, and he would accordingly be entitled to a re-opening and re-classification by his local board. It would follow, of course, that any failure to accord such procedure to a registrant so situated would constitute a denial of due process.

5/ The Seventh Circuit recently re-affirmed its position in Schoebel in United States v. Porter, 314 F.2d 833 (7th Cir., 1963).

situations essentially indistinguishable from that presented here, the courts held without qualification that "[b]elated development of conscientious objection is not a change in status beyond the control of [a] registrant." Davis v. United States, supra, at p.4.

This Court indicated its apparent approval of that position in Boyd v. United States, 269 F.2d 607 (9th Cir., 1959), 6/ and in Parrott v. United States, 370 F.2d 388 (9th Cir., 1966), ostensibly rejected Judge Kaufman's position in Gearey.

Certainly such a position is not unreasonable, even though it may arguably be said to be in conflict with the apparent desire of Congress to protect those conscientiously opposed to participation in war in any form from the induction process. Clearly the exemption for conscientious objectors, found in Section 456(j) of the Universal Military Training and Service Act, is provided as a matter of legislative grace, and it is not unreasonable, therefore, in determining it's availability to defer in some measure to the obvious need for an efficient operation of the Selective Service System. To

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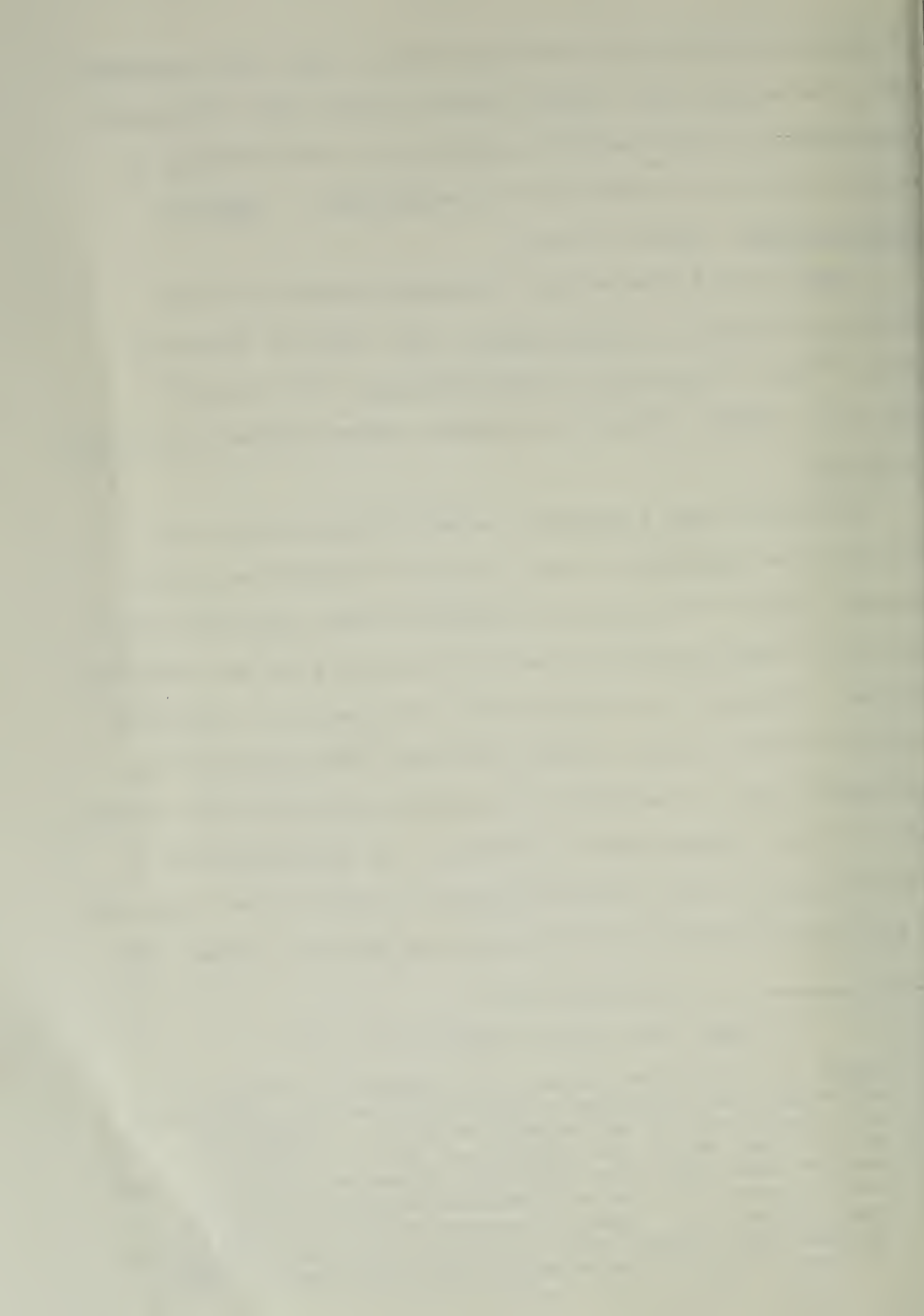
6/ In Boyd, this Court stated at p. 610:

> There is not raised herein the proposition that conscientious objections resulting from the promptings of a registrant's conscience would be a change of status over which the registrant has no control. But we think that such an interpretation would, as other courts have said, be a 'strained interpretation of the regulation.' Such interpretation would make redundant and useless any finding by the Board subsequent to the filing of the conscientious objector's claim.



require a local board to make the almost impossible factual determination with respect to when a registrant's views might have "crystalized" in each case where the claim is filed after an induction order was mailed, and to then permit a registrant who's classification was not re-opened to litigate the basis for the board's determination, would clearly impair the efficiency of the System to an extent not required, it is submitted, by the enactment of Section 456(j). It may be that to essentially cut off the availability of the exemption with the mailing of an Induction Notice would be to draw too arbitrary a line, but as this Court stated in Boyd:

> There must be some end to the time when registrants can raise a claim of conscientious objection to induction, and raise and re-raise an alleged right to review. Any other conclusion would result in chaos. Boyd v. United States, supra, at p. 612.

II. IN THE RECORD BEFORE THIS COURT, APPELLANT HAS NOT MADE OUT A PRIMA FACIE CLAIM FOR CONSCIENTIOUS OBJECTOR STATUS, AND THUS THIS COURT CAN FIND A BASIS IN FACT FOR THE ACTION OF THE LOCAL BOARD WITHOUT REFERENCE TO ANY FINDING MADE BY THE TRIAL COURT.

As an alternative to the position urged in the previous section, the Government submits that a basis exists in the record before this Court for affirming appellant's conviction without reference to the question of whether under some circumstances a change in status to that of conscientious objector is a change within the ambit of 32 C.F.R. § 1625.2.

As previously indicated, aside from his remark regarding an acquittal, there is nothing in the record to suggest that Judge Zirpoli was persuaded that appellant was entitled to conscientious objector status, and it is the Government's position, therefore, that this Court can rule, based upon a review of the record, that as a matter of law he was not. Clearly his Form 150 and the letters which accompanied it do not, even under the most generous interpretation of United States v. Seeger, 380 U.S. 163 (1965), present a prima facie claim, 7/ and under these circumstances, this Court can conclude that the local board did not deny appellant due process in refusing to re-open his classification. As recognized in Gearey, there can be no change in status if appellant is not now and never has been entitled to the exemption, and thus there is presented a basis in fact for the board's action which in turn provides a basis for upholding appellant's conviction. 8/

7/ Without regard to the sincerity of appellant's beliefs, or the fact that he failed to sign either statement A or B on the face of the Form 150, it is apparent that he is espousing a purely moral position, which is specifically excluded from the ambit of the exemption.

8/ The only claim of denial of due process raised by appellant by way of defense related to the board's refusal to re-open following the submission of his Form 150.

CONCLUSION

For the reasons set forth herein, we respectfully submit that the conviction of the appellant should be affirmed.

DATED: November 20, 1967.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

PAUL G. SLOAN
Assistant United States Attorn

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL G. SLOAN
Assistant United States Attorney

No. 21930

EHLERT v. UNITED STATES

CERTIFICATE OF MAILING

This is to certify that three copies of the foregoing Brief of the Appellee was mailed this date to Arthur Wells, Jr., Esq., Wells & Chesney, 2550 Telegraph Avenue, Berkeley, California, Attorney for Appellant.

DATED: November 20, 1967.

PAUL G. SLOAN
Assistant United States Attorney

No. 21930

EHLERT v. UNITED STATES